**GISELA GERTRUD ABE**

**v.**

**TAN WEE KIAT**

SUPREME COURT, KUALA LUMPUR
SALLEH ABAS LP
GEORGE SEAH SCJ
SYED AGIL BARAKBAH SCJ
[CIVIL APPEAL NO. 179 OF 1985]
10 MAY 1986

***FAMILY LAW:*** *Maintenance order - Appeal against rescission of order - Court's power to rescind such an order - Sections 83, 96 of the Law Reform (Marriage & Divorce) Act 1976 - Factors to be taken into account by a Court for variation of maintenance orders - Sections 78, 82(1), 95, 99.*

***CIVIL PROCEDURE:*** *Jurisdiction - Whether Court had power to rescind a maintenance order - Sections 83, 96 of the Law Reform (Marriage & Divorce) Act 1976 - Whether the Judge erred in varying the amount of the maintenance order.*

The marriage between the parties above was dissolved in 1979 and by an Order of the High Court the respondent was ordered to pay periodical payments for the maintenance of the appellant and the two daughters of the marriage in the sum of RM1,500 each month. The respondent then approached the Court for a variation of the maintenance order due to a change in his financial circumstances. The learned Judge then directed that the maintenance order dated 4 May 1979 for the period from 6 June 1983 to 5 January 1984 be rescinded and that the amount of maintenance be varied from RM1,500 to RM800 per month from 6 January 1984 to 31 May 1985 and from RM800 to RM400 per month from 1 June 1985 until further order. The appellant was dissatisfied with these decisions and appealed to the Supreme Court.

The appellant contended that the Court had no power to rescind an order for maintenance from 6 June 1983 to 5 January 1984 or for any other period of time. It was also contended by the appellant that the learned Judge erred in varying the amount of the maintenance order.

Judgment of the Court was delivered by George Seah SCJ

**Held:**

**[1]** Sections 83 and 96 of the Law Reform (Marriage & Divorce) Act 1976 give the Court a general power to vary or rescind any subsisting periodical payments for the wife and/or the children of the marriage where it is satisfied that it was based on any misrepresentation or mistake of fact or where there has been any material change in the circumstances.

**[2]** After a discussion on the meaning of "rescind" the Court held that the word "vary" should be given a wide meaning and should not be confined only to increase or reduce the amount of maintenance payments but also to include the power to "suspend" the maintenance order or any provisions therein temporarily and to revive the operation of the maintenance order or any provisions so suspended.

**[3]** As a result, the learned Judge had the power under ss. 83 and 96 to make an order suspending the operation of the order of maintenance during the period from 6 June 1983 to 5 January 1984 respectively.

**[4]** When an application is made to the Court to vary an existing order for maintenance, the proper approach is to start from the original order and see what changes financial or otherwise, have taken place since that date including any changes which the Court is required to have regard to under s. 78 as well as any increase or decrease in the means of either of the parties to the marriage and make adjustments roughly in proportion to the changes, if that is possible.

**[5]** Bearing in mind that the material changes in the circumstances of the respondent had taken place since 1975 (details of which have already been enumerated) the Court was satisfied that the respondent had made out a *prima facie* case for a variation of the maintenance due and payable to the appellant alone and this was to take effect from 6 January 1984 (See judgment for details of variation).

*[Appealed allowed.]*

**Cases referred to:**
*Bellenden v. Satherthwaite [1948] 1 All ER 343*
*Cockburn v. Cockburn [1957] 3 All ER 260*
*Kershaw v. Kershaw [1964] P 13*

**Legislation referred to:**
Law Reform (Marriage & Divorce) Act 1976, ss. 78, 82(1), 83, 95, 96, 99(1)

*For the appellant-S. Sivasubramanian; M/s. Siva, Ram & Associates*
*For the respondent-Kingston T.K.Tan; M/s. Kadir, Tan & Ramli*

## JUDGMENT

**George Seah SCJ:**

This is an appeal by the wife (hereinafter referred to as the appellant) against an Order of Siti Norma Yaakob J directing that the maintenance order dated 4 May 1979 for the period from 6 June 1983 to 5 January 1984 be rescinded. The learned Judge further directed that the amount of the maintenance be reduced in the manner following:

(a) From RM1,500 to RM800 per month from 6 January 1984 to 31 May 1985 and

(b) From RM800 to RM400 per month from 1 June 1985 onwards until further order.

The appellant was dissatisfied with these decisions and has appealed to the Supreme Court.

The first point taken by learned Counsel for the appellant was that the Court had no power to rescind an order for maintenance from 6 June 1983 to 5 January 1984 or for any other period of time. This contention was disputed by learned Counsel for the husband (hereinafter referred to as the respondent). In our opinion, the answer to this submission depends upon the true construction to be given to ss. 83 and 96 of the Law Reform (Marriage & Divorce) Act 1976 (hereinafter referred to as the Act). It is common ground that these sections give to the Court a general power to vary or rescind any subsisting periodical payments for the wife (s. 83) and /or the children (s. 96) of the marriage where it is satisfied that it was based on any misrepresentation or mistake of fact or where there has been any material change in the circumstances.

Now to "rescind" means to abrogate, annual, revoke, cancel, discharge or to put an end to altogether. It follows that when a maintenance order is rescinded by a Court order it ceases to exist henceforth. Adopting this interpretation, we are constrained to hold that the general power contained in ss. 83 and 96 of the Act does not empower the Court to make an order discharging the maintenance order for a limited period of time. That however, is not the end

of the matter. It seems to us that the learned Judge did not intend to abrogate the maintenance order altogether as it was clear from the latter part of the Court Order that it was to take effect at a reduced rate of RM800 per month from 6 January 1984 to 31 May 1985 and thereafter at RM400 each month from 1 June 1985 onwards. It appears to us that the learned Judge has intended the maintenance order to be suspended during the period when the respondent was unemployed after having been retrenched by his employer from 6 June 1983 to 5 January 1984. The question we have to determine was whether or not the Court had the power to do so under ss. 83 and 96 of the Act? In our opinion, the word to "vary " should be given a wide meaning and should not be confined only to increase or reduce the amount of the periodical payments of maintenance for the wife and/or the children of the marriage but also to include power to "suspend" the maintenance order or any provisions therein temporarily and to revive the operation of the maintenance order or any provisions so suspended. Applying this to the facts herein we rule that the learned Judge had the power under the provisions of ss. 83 and 96 of the Act to make an order suspending the operation of the order of maintenance during the period from 6 June 1983 to 5 January 1984 respectively. In making such an Order the learned Judge appeared to have taken the undermentioned factors into consideration:

(a) That the respondent was unemployed during this 7-month period when he was retrenched by his company;

(b) That he had to borrow money from his mother to discharge a bank loan he obtained from United Asian Bank on the security of a house at Ukay Heights, Kuala Lumpur which is registered in the name of the appellant during this period of unemployment;

(c) That he was forced to ask for further loans from his mother and sister:

(i) to pay the taxed costs of the divorce proceedings amounting to RM8,414.62,

(ii) to pay his own legal fees of RM10,415.27,

(iii) to settle a judgment-debt of RM2,469.67 in favour of the appellant and

(iv) to deposit with the appellant's solicitor a sum of RM10,500 representing 7-month arrears of maintenance pending the result of his application to the Court.

It was not disputed that the respondent had deposited with Malayan Banking Bhd. some warrants from Consolidated Plantations Bhd. as security for an overdraft. The learned Judge was satisfied that the bank had converted them into shares and had the shares sold and utilized part of the proceeds of sale to offset the overdraft account and returned the balance of approximately RM30,000 to the respondent. The learned Judge found as a fact that the respondent used this RM30,000 towards partial repayment of the large debt which he owed to his mother. We see no good reasons to differ from the learned Judge in the exercise of her discretion regarding this part of the maintenance order during this 7-month period except to substitute "suspend" for the word "rescind" thereof.

It was then argued by learned Counsel for the appellant that the effect of back-dating the Court Order from 6 June 1983 to 5 January 1984 would tantamount to ordering a refund of the periodical payments back to the respondent. A perusal of the notes of proceedings would appear to indicate that the respondent did not actually pay the sum of RM10,500 but that the amount was merely deposited with the appellant's solicitor pending the outcome of his application to the Court. Since we have already held that the learned Judge only intended to suspend the maintenance order for a period of seven months, there is no need to express any opinion on this submission except to state that it seems to be misconceived.

Next, it was submitted by learned Counsel for the appellant that the learned Judge erred in varying the amount of the maintenance order:

(a) from RM1,500 to RM800 per month from 6 January 1984 to 31 May 1985 and

(b) from RM800 to RM400 per month from 1 June 1985 onwards.

Before dealing with this submission we would like to set out briefly the material changes of circumstances relied on by the respondent for these variations.

Firstly, when the marriage was dissolved in 1979 by an Order of the High Court the respondent was ordered to pay periodical payments for the maintenance of the appellant and 2 daughters of the marriage in the sum of RM1,500 each month. At that time, the respondent was working for Conzinc Tiotinto Malaysia Sdn. Bhd. at a monthly salary of RM5,000 and the 2 daughters, Tan Kay-ti and Tan Su-lin were 16 and 11 years old respectively having been born on 8 December 1962 and 31 May 1967. They were apparently living with their mother in Kuala Lumpur. However, the respondent was retrenched in mid-1983 and was unemployed from 6 June 1983 to 5 January 1984. On 6 January 1984 he found employment with Malayan United Management Sdn. Bhd. at a reduced salary of RM3,000 per month and after deducting Employees Provident Fund contribution his nett take-home pay was RM2,730. Secondly, in 1979 the respondent remarried and the second wife brought along 3 children from her previous marriage to live with them. No attempt was made to establish whether the former husband of the second wife has been ordered by the Court to pay maintenance for the upkeep of these 3 children of the marriage. Nor was there any evidence to show that the respondent has accepted the 3 children of the second wife as members of his family. In our opinion, these are relevant factors having regard to the provision of s. 99(1) of the Act. Thirdly, following his remarriage, the respondent and the second wife jointly purchased a house at No.8, Jalan Aman, Kuala Lumpur for the sum of RM380,000 with a bank loan of RM200,000 and a monthly repayment of RM2,761. Fourthly, the 2 daughters of the marriage had now reached their eighteenth birthdays, Tan Kay-ti on 8 December 1980 and Tan Su-lin on 31 May 1985. Lastly, the appellant has had been operating her own business under the style of Tanabe Holdings Sdn. Bhd. since 1982 albeit the balance sheets for the years 1982, 1983 and 1984 showed losses of RM2,983.13, RM10,320.53 and RM15,260.24.

In controversial matters as to the amount of maintenance to be ordered or reduced in an application to vary a subsisting order for maintenance due to material changes of circumstances, there is room for differences of opinions as to what should be the fair sum, what is just and what is reasonable in the circumstances. However, in deciding an application to vary an existing maintenance order, in our opinion, a Court should always be guided by certain basic considerations. The first and foremost is that on a dissolution of the marriage, both the husband and the wife are legally entitled to remarry and to start a new family. When a husband does so he will assume new financial burdens and responsibilities in that he now has a legal obligation to support the second wife and he may undertake a moral obligation to look after any step-children of the second wife. Since there are now two households to be maintained in place of the former one the resources of the husband have also to be shared (see *Bellenden v. Satherthwaite* [1948] 1 All ER 343; *Cockburn v. Cockburn* [1957] 3 All ER 260 @ 263 per Hodson LJ and *Kershaw v. Kershaw* [1964] P 13 at 17 per Sir Jocelyn Simon P.). *Pro tanto* the means of the husband will "decrease' and that of the wife may "increase". On the other hand, if the wife remarries, her right to periodical payments in the form of maintenance shall cease (see s. 82(1) of the Act) as the wife will secure a new legal right to be supported. In the second place, an order for maintenance of a normal child of the marriage shall expire on the child attaining the age of eighteen years (see s. 95 of the Act).

When the elder daughter, Tan Kay-ti reached her eighteenth birthday on 8 December 1980 and therefore ceased to be entitled to support from her father, it appeared that the respondent continued to pay the sum of RM1,500 each month to the appellant without protest until he was retrenched by his company in mid-1983. Until the maintenance order was varied by the Court the respondent was bound to pay it and the appellant was entitled to receive it. The second daughter, Tan Su-lin attained the age of eighteen years on 31 May 1985. Having regard to these uncontroverted facts the learned Judge was right to vary the amount of the maintenance in view of the implicit provision of s. 95 of the Act.

Learned Counsel for the appellant did not seek to challenge the power of the Court to make these variations; his only complaint appeared to be one of quantum. In our opinion, when an application is made to the Court to vary an existing order for maintenance, the proper approach is to start from the original order and see what changes financial or otherwise, have taken place since that date including any changes which the Court is required to have regard to under s. 78 of the Act as well as any increase or decrease in the means of either of the parties to the marriage and make adjustments roughly in proportion to the changes, if that is possible.

We were reminded by learned Counsel for the appellant that when the Court ordered the respondent to pay maintenance in the sum of RM1,500 per month in 1979 both the daughters of the marriage were apparently living with their mother in Kuala Lumpur. It was argued that this figure did not appear to take into account the future prospects that either one or both the daughters would be proceeding to the United Kingdom for higher studies. The fact that both are now studying abroad should not be a material factor to be considered by the learned Judge when the same was disregarded in 1979. If this were not to be taken into consideration, it was contended that the estimated costs for board and lodging, pocket-money, tuition fee when the daughters were studying in Kuala Lumpur and other expenses of a personal nature would be in the region of RM300 each month. Using our local knowledge of living conditions in Kuala Lumpur, we think this seems a reasonable sum and we would therefore accept it for the purpose of this appeal.

It was pointed out (correctly in our opinion) by learned Counsel for the appellant that the learned Judge was inconsistent in varying the order of maintenance in that when the elder daughter, Kay-ti was no longer legally entitled to claim support from the respondent, the variation was from RM1,500 to RM800 per month from 6 June 1983 to 5 January 1984. This represents a substantial monthly reduction of RM700. Whereas when the second daughter, Su-lin reached her eighteenth birthday on 31 May 1985 the reduction was RM400 each month. We recognised the force of this submission. In our opinion, unless there is evidence to the contrary, for example, when the child is under a physical and/or mental disability, the same amount of the variation should be adopted by the Court. To do otherwise may result in uncertainty in the laws. It follows that the learned Judge erred when she allowed a reduction of RM700 per month in respect of Kay-ti and only RM400 each month for Su-lin. In our judgment, the learned Judge ought to adopt the same amount for each daughter and she misdirected herself when she failed to do so. Bearing in mind that material changes in the circumstances of the respondent had taken place since 1979 which have already been enumerated and which we need not recapitulate here, we are satisfied that the respondent had made out a *prima facie* case for a variation of the maintenance due and payable to the appellant alone to take effect from 6 January 1984. Ignoring the 7 month period from 6 June 1983 to 5 January 1984 which had already been provided for, taking a realistic view and giving our best attention to the matter, we consider a reduction of RM300 per month would

be a fair and reasonable sum in the circumstances. We therefore substitute the figures of RM900 for RM800 per month from 6 January 1984 to 31 May 1985 and RM600 for RM400 each month from 1 June 1985 onwards. For the above reasons we allow the appeal with costs here only to be taxed. The deposit to be refunded to the appellant.

Also found at [1986] 2 CLJ 202